

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of)
HALACO ENGINEERING COMPANY and the)
DEPARTMENT OF FISH AND GAME for)
Review of Order No. 80-58 of the)
California Regional Water Quality)
Control Board, Los Angeles Region.)
Our Files Nos. A-283 and A-283a.)
_____)

Order No. WQ 81-14

BY THE BOARD:

On October 27, 1980, the California Regional Water Quality Control Board, Los Angeles Region (Regional Board) adopted Order No. 80-58 prescribing revised waste discharge requirements for Halaco Engineering Company (Halaco). The State Water Resources Control Board (State Board) received petitions for review of Order No. 80-58 on November 24, 1980, from the California Department of Fish and Game (the Department) and on November 25, 1980, from Halaco. Because the petitions are factually related, they have been consolidated for State Board review.^{1/}

I. BACKGROUND

Halaco operates a metal recycling plant on a 40 acre site located in the City of Oxnard adjacent to the Pacific Ocean. The company recovers aluminium, magnesium and lesser amounts of zinc, by a smelting process, from scrap metal.

1. See Footnotes attached.

Approximately 25 acres of the site are used for waste disposal. Wastewater from the metal recovery operation and from an air scrubber is discharged to an unlined pond covering about 10 acres. Approximately 22,000 tons of solid waste materials settle out in the pond each year. The pond is surrounded by berms or dikes, which are constructed of settled waste residue from the pond. The remaining 15 acres of disposal area lie north of and contiguous to the northern berm of the waste pond. Periodically, the pond is dredged and the accumulated waste residues are deposited primarily on the northern berm of the pond. As a result, the northern berm has expanded in width to cover about 40 percent of the remaining 15-acre disposal area. In addition, solid waste residues have recently been spread in the area north of the northern berm and now cover most of the remaining 15-acre area.

The 25-acre disposal area is located within the Oxnard Hydrologic Subarea. The site is immediately landward of the coastal sand dunes in an area where natural ground surface elevations vary from about zero to seven feet above sea level. The Oxnard Industrial Drain flood control channel borders the western edge of the disposal area and discharges to the ocean.

The discharge site is underlain by a sequence of fine-grained sediments, consisting of sand, silt and clay. These sediments contain a semiperched groundwater body, about 50 feet thick, historically containing waters of poor mineral quality. High groundwater conditions that prevail in the semiperched zone have necessitated tile line drainage in nearby agricultural

areas. The movement of groundwater in the semiperched zone is generally toward the ocean.

A silty clay interval, 90 to 100 feet thick, of low permeability separates the semiperched zone from the top of the Oxnard aquifer. The Oxnard aquifer is in hydraulic continuity with the ocean and has been severely intruded by sea water over an extensive area.

Because of its poor mineral quality, waters from the semiperched zone are not used for domestic, agricultural, or industrial water supply in any significant amount. Nearshore ocean waters are beneficially used for the preservation of marine habitat and rare and endangered species, contact and noncontact water recreation, shellfish harvesting, commercial and sport fishing and navigation.

The requirements adopted by the Regional Board in Order No. 80-58 for the Halaco site require barriers with permeabilities of 1×10^{-6} cm/sec or less beneath and around the settling pond and the berms to prevent lateral and vertical migration of wastes or waste leachate to ground or surface waters. The requirements, in addition, specify that discharge areas must be adequately protected from surface runoff and inundation from flooding. Order No. 80-58 requires Halaco to submit a detailed operations plan, which addresses measures to comply with requirements. The plan must contain, for example, the design specifications for the pond barriers, including core depths, compaction, permeability and earthquake and flood structural stability. The plan must also contain detailed hydrologic and geologic data regarding the disposal area.

Additionally, Order No. 80-58 includes an extensive monitoring program to determine whether the wastes or waste leachate from the disposal area is reaching or has reached waters of the State.

II. REQUEST FOR HEARING

Halaco has requested that the State Board hold a hearing in this matter to consider additional evidence which was not available prior to the Regional Board hearing.^{2/} A hearing was held by the Regional Board to consider the Halaco requirements at a special meeting in Oxnard on June 24, 1980. This hearing was continued to a regular Board meeting on October 27, at which time the Regional Board voted to adopt Order No. 80-58. On both occasions, Halaco was given ample opportunity to present evidence to the Regional Board. After reviewing the Regional Board record, the State Board concludes that an additional hearing is unwarranted.

III. CONTENTIONS AND FINDINGS REGARDING HALACO

A. Contention: Halaco contends that the Regional Board lacked jurisdiction to adopt Order No. 80-58 because there is no significant likelihood that wastes discharged by Halaco at its site will either reach waters of the State or, if they reach waters of the State, will detrimentally affect waters of the State.

Finding: In support of its contention, Halaco argues that the groundwaters underlying the site, both in the semiperched

2. See Footnotes attached.

zone and the Oxnard aquifer, are unusable. Further, Halaco maintains that there can be no vertical migration of wastes to the groundwater, in any case, because the soils at the site are clay in nature and impermeable.

With respect to lateral movement, Halaco contends that its property slopes from the northeast to the southwest, toward the Industrial Drain. Halaco further contends that the eastern side of the drain has a levee, most of which was constructed from clay soils in the area. Halaco argues that the clay composition of the levee soils would prevent the horizontal movement of wastes. Even assuming, however, that the soils were somewhat permeable, Halaco maintains that hydrologic pressure is greater from the drain to the Halaco waste disposal site than the reverse. Consequently, fluids would flow from the drain to the site and not the reverse.

In addition, Halaco contends that, even if its waste could reach waters of the State, it could not unreasonably affect those waters. Halaco indicates that distilled water leachate tests on its waste have demonstrated that, but for the salt content of the leachate, the leachate meets drinking water standards.

Under Water Code Sections 13260 and 13263, a Regional Board has jurisdiction to adopt waste discharge requirements if (1) any person is discharging or proposing to discharge waste within any region which (2) could affect the quality of the waters of the State. The record reflects that both of these elements are present with respect to the Halaco discharge.

Halaco is clearly discharging "waste"^{3/} at its 25-acre disposal site. The waste from Halaco's metal recovery operation contains various heavy metals, including copper, zinc, lead, and other compounds, in addition to high levels of salts.

The solid waste that settles out in the disposal pond contains fairly large quantities of metals. The liquid in the pond, by comparison, contains much smaller quantities. Samples of pond effluent indicate that, with the exception of chromium, the effluent at times meets State Drinking Water Standards, with respect to its heavy metal content, although the metals are at concentrations which might be toxic to fish.^{4/}

The record indicates that the wastes may reach waters of the State. The berms enclosing the 10-acre disposal pond are constructed of waste residue dredged from the pond. No data have been provided regarding the engineering properties of the waste residue to assess if the existing berms consist of properly compacted, low permeability material which would prevent lateral waste fluid migration.^{5/} Neither has data been submitted to demonstrate that the berms are structurally competent to withstand failure due to anticipated seismic accelerations or washouts or inundation due to 100-year frequency flooding.

In addition, no data has been furnished to verify that the stretch of the levee bordering the Industrial Drain along the

3. See Footnotes attached.

4. See Footnotes attached.

5. See Footnotes attached.

west side of the Halaco disposal site is, in fact, impermeable. Finally, topographical data submitted by the company to the Regional Board indicates that the toe of the pond is at a higher elevation than the top of that portion of the Industrial Drain berm, which is adjacent to the pond. Consequently, water would be at a higher elevation in the pond than in the Industrial Drain and would tend to flow toward the drain rather than the reverse, as asserted by Halaco.

Data in the record also indicates that high groundwater conditions historically have prevailed in the disposal area. These conditions may result in long term contact between wastes in the disposal pond and the semiperched groundwater. Because there is hydraulic continuity between the semiperched zone and the ocean, leachate percolating into the shallow groundwater can migrate to nearshore ocean waters. Data available to date on waste fluid movement potential between the pond and the underlying groundwaters have been inconclusive.^{6/}

Finally, the settled solid waste residues discharged at the Halaco site and used for the construction of the disposal pond berms may reach waters of the State as a result of flooding or erosion from rainfall or runoff from tributary areas. No data has been provided to indicate that the solid waste residues are adequately protected against these occurrences.

Given that wastes are discharged at the Halaco site, which differ in quality from the ocean and the underlying

6. See Footnotes attached.

groundwater, and that these wastes may reach waters of the State, the Regional Board has jurisdiction to regulate the discharge. The Regional Board need not show that the discharge will have an unreasonable effect on water quality before attempting to issue waste discharge requirements.^{7/} In this regard, State Board Order No. WQ 79-39 contains the following pertinent language:

* * *

"That the Regional Board should await substantial evidence of a discharge of waste causing unreasonable harm to state waters before issuing waste discharge requirements is a proposition directly in opposition to the intent of the Legislature when the Porter-Cologne Water Quality Control Act was adopted in 1969 (Water Code Sections 13000, et seq.) When enacting these comprehensive changes to the state's water quality laws, the Legislature declared "...that activities... which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable..." and that the "...welfare of the people of the state requires that there be a state-wide program for the control of the quality of all the waters of the state, that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation...." (Section 13000.) Section 13260 requires that '[a]ny person discharging...or proposing to discharge waste... that could affect the waters of the state...shall file' a report of the discharge with the Regional Board. Section 13263 provides that '[t]he regional board... shall prescribe requirements...as to the nature of any proposed discharge....' It is thus clear that the Regional Boards are empowered to take preventive action to regulate activities that may affect the quality of the waters of the state and need not await evidence establishing that a discharge causes or will cause a condition of pollution or nuisance."

* * *

Page 8-9.

7. See Footnotes attached.

B. Contention: Secondly, Halaco contends that, given the history and status of its waste disposal site, the Regional Board acted arbitrarily and capriciously in adopting Order No. 80-58.

Finding: The history, in brief, of the Halaco disposal site is that in 1970 the Regional Board adopted Resolution No. 70-63, regulating the direct discharge of industrial wastes by Halaco to the Oxnard Industrial Drain. Shortly after adoption of Resolution No. 70-63, the company ceased its direct discharge to the drain. From 1970 to 1979, however, the Regional Board did not attempt to revise requirements for Halaco.

In 1977, an enforcement action was initiated by the United States Army Corps of Engineers against Halaco on the ground that the discharges at the Halaco disposal site north of the settling pond were occurring on a wetlands for which a permit under Section 404 of the Clean Water Act^{8/} was required. Halaco subsequently filed a suit for declaratory relief in the federal district court contending that the property was not a wetlands and, therefore, was not subject to the jurisdiction of the Corps. After an adverse ruling on the Corps' motion to dismiss the complaint, the Corps issued a final determination in 1978 that the property was not subject to the Corps' regulations requiring a permit for the discharge of dredged or fill material. The Corps further determined that its position related only to the Corps and not to other governmental agencies. After issuance of the Corps' final determination, the court action was dismissed.

8. See Footnotes attached.

In 1980, the Environmental Protection Agency (EPA) issued an Enforcement Order to Halaco under the Clean Water Act on the ground that the 25-acre disposal site constitutes a wetlands for which a National Pollutant Discharge Elimination System (NPDES) permit is required. In response, Halaco again filed for declaratory relief in the federal district court, seeking a declaration that an NPDES permit is not required. EPA subsequently filed a counterclaim against the company, pleading in the alternative that the discharge is subject to regulation under either Section 402^{9/} or 404 of the Clean Water Act. EPA has obtained a preliminary injunction in the action, prohibiting further discharge of solid wastes at the 15-acre disposal area north of the pond pending a hearing on the merits of the action. That hearing has apparently not yet been scheduled.

Halaco has also been involved in litigation with the State Coastal Commission over the issue of whether a permit was required from the Commission for the expansion of the disposal pond into the area north of the northern berm. The Commission obtained an adverse ruling on this issue in the trial court, and an appeal is presently pending in the State Court of Appeal.

Several other agencies have become involved with the Halaco site. The State Department of Health Services (Health Services), by a letter dated December 18, 1979, from Michael L. Kiado of the Hazardous Materials Management Program to Leslie Fine of Halaco, requested that Halaco file an application for a

9. See Footnotes attached.

hazardous waste facility permit on the ground that several components of the Halaco waste are hazardous. Halaco has disputed the methods of sample preparation and analyses used by Health Services; and to date, no agreement has been reached between Health Services and the company resolving these issues.

The State Department of Fish and Game has taken the position before the State Coastal Commission, South Central Coast Commission, and the Regional Board, that the site constitutes a wetlands. The United States Department of Interior, Fish and Wildlife Service, has also taken the position that the property constitutes a wetlands for which an NPDES permit should be issued.

Halaco contends that the Regional Board acted arbitrarily and capriciously in adopting Order No. 80-58 on the ground that the various state and federal agencies mentioned above have created a "tempest in a teapot" for the Regional Board, resulting in the imposition of waste discharge requirements under circumstances in which the Regional Board did not feel that there were any significant water quality problems. In this regard, Halaco refers to a letter to the South Central Coast Regional Commission from Raymond M. Hertel, Executive Officer of the Regional Board, dated January 8, 1979, in which Mr. Hertel stated:

"You also asked what is 'the degree of leaching of chemicals into the existing wetland areas.' A number of samples have been obtained from observation wells and test holes in the general vicinity of the pond in an effort to determine whether there is subsurface hydraulic continuity between the waste effluent in the pond and the semiperched groundwaters which underlie the pond and

adjacent wetland areas. Because of the complexity of the site conditions, however, the results have been inconclusive. However, we have not observed any water quality problems in the groundwaters outside the site." (Emphasis added.)

We note, first of all, that Resolution No. 70-63, in addition to regulating the discharge of wastes from the Halaco site to the Industrial Drain, also imposed effluent limitations for "wastes discharged to unlined ponds" and provided that "[s]olid wastes shall be confined to the company's property at all times and no liquids shall be allowed to pond on this material." Consequently, the discharge of wastes to land at the Halaco site has been regulated by the Regional Board since at least 1970.

Secondly, the comments of Mr. Ray Hertel in the January 8, 1979, letter to the Regional Coastal Commission fail to support a conclusion that it is inappropriate for the Regional Board to regulate waste discharges at the Halaco site. The fact that no water quality problems have been observed in the groundwaters outside the site does not mean that the potential does not exist nor does it address potential lateral migration of wastes from the pond to the Industrial Drain and the ocean.

Finally, we note that Water Code Section 13263(e) and Section 2232.2 of Title 23 of the California Administrative Code require periodic review and revision, if necessary, of waste discharge requirements. Because circumstances had changed since the original requirements were issued, revision of the Halaco requirements was certainly appropriate, if not overdue. The fact that Halaco had discharged wastes for a number of years, pursuant to Resolution No. 70-63, did not create a vested right

in the company to continue such a discharge. The Water Code clearly provides that all discharges of waste into waters of the State are privileges, not rights. Water Code Section 13263(g).

C. Contention: Halaco also argues that the Regional Board failed to consider the economic impact on Halaco and the community of compliance with the terms of Order No. 80-58.

Finding: Among other things, Halaco asserts that it is an affirmative action employer, that it saves significant amounts of energy by recycling metal, and that it would be forced to go out of business if the company were compelled to dispose of its wastes off site.

Water Code Sections 13241 and 13263 require the Regional Boards to "take into consideration" economic considerations, as well as other factors, in adopting waste discharge requirements. The record reflects that the Regional Board did so. Halaco was given the opportunity to present both written submittals and oral testimony on this issue before the Regional Board. Further, Order No. 80-58 does not require off-site disposal, but rather allows a continued discharge, provided that the wastes are adequately contained at the site. To illustrate, Waste Discharge Requirement A.5 of Order No. 80-58 provides that the existing berms may fulfill a requirement that barriers of sufficient permeability be maintained around the settling pond.

D. Contention: Finally, Halaco contends that Order No. 80-58 should be revised to provide that if certain quantitative criteria are met by the company, the company need not comply with other discharge requirements.

Specifically, Halaco proposes a new discharge requirement which would provide that the company is to meet Waste Discharge Requirements Nos. 5, 6, 7, 9 and 11 of Order No. 80-58^{10/} only when and if monitored samples of Halaco's waste indicate that the chemical composition of the waste exceeds certain limitations. As indicated above in Section A of this Order, the Regional Boards are empowered under the Porter-Cologne Act to take preventive action to regulate activities that may affect water quality without waiting for evidence establishing that a particular discharge causes or will cause a condition of pollution. Halaco's proposal would place the Regional Board in the position of reacting to a condition of pollution rather than preventing it, and, for this reason, the Regional Board properly rejected the proposal.

IV. CONTENTIONS AND FINDINGS REGARDING THE DEPARTMENT^{11/}

A. Contention: The Department contends that Order No. 80-58 is inappropriate because it fails to contain findings regarding the hazardous nature of the wastes disposed at the Halaco site. The Department contends that by not addressing this issue the Order allows the off-site disposal of hazardous wastes at a site which would be inadequate for such disposal.

Finding: The Hazardous Waste Control Act, as amended (Chapter 6.5, Division 20 of the California Health and Safety Code) vests authority in Health Services to regulate the handling, storage and disposal of hazardous wastes.

10. See Footnotes attached.

11. See Footnotes attached.

This authority includes the determination of whether certain wastes are hazardous and the issuance of hazardous waste facilities permits. Health and Safety Code §§25200 et seq. As discussed in Section III.B., above, of this Order, Health Services has not resolved whether such a permit is required for the Halaco site.^{12/}

It was unnecessary for the Regional Board to determine whether the Halaco wastes are "hazardous", as defined in the Health and Safety Code,^{13/} prior to issuing waste discharge requirements. However, certainly the character of the waste stream in addition to hydrogeology of the area and other factors must be considered by the Regional Board in determining appropriate waste discharge requirements. See Water Code §§13241, 13263.

We have reviewed the record and conclude that the Regional Board did take these factors into consideration in regulating the discharge of wastes by Halaco to its settling pond. Our review of the data generated by Health Services reveals that the metal scan fluorescence method was used to detect the concentration of metal in the liquid and solid phases of the waste. This method is incapable of segregating soluble and insoluble metals. A high concentration of metals was found in the solids but not in the ponded liquids, indicating that the metals are probably in the insoluble form. These substances would not ordinarily pose a significant threat to water quality, unless they were

12. See Footnotes attached.

13. See Footnotes attached.

exposed to an acidic environment, which would allow the metals to leach out,^{14/} or the solid materials were not adequately protected from erosion due to flooding or runoff. In this regard, Order No. 80-58 requires that the pond and the surrounding berms be provided with impermeable barriers.^{15/} The barriers to prevent lateral migration must be equipped with collection drains and sumps to intercept all seepage for return to the discharge site or removal to an appropriate disposal site.^{16/} In addition, Order No. 80-58 requires that the disposal area be protected from erosion due to runoff and flooding.^{17/} After considering the hydrologic and hydrogeologic characteristics of the site, and the nature of the waste at the Halaco site, we find that Order No. 80-58 is appropriate to protect water quality with respect to the discharge of wastes by Halaco to its settling pond. For the reasons stated in Section II.B. below, however, we are concerned about whether the Order adequately addresses the disposal of dredged material on the 15-acre portion of Halaco's site north of the settling pond.

The Department also contends that the Order authorizes the offsite disposal of hazardous wastes at a site inadequate for such disposal. Waste Discharge Requirement A.13 of Order No. 80-58 requires that any wastes removed from the Halaco site be disposed

14. See Footnotes attached.

15. See Footnotes attached.

16. See Footnotes attached.

17. See Footnotes attached.

of at a legal disposal site. A "legal disposal site" is defined in the Order as one for which waste discharge requirements have been prescribed by the Regional Board and which is in compliance with such requirements. We note that waste discharge requirements for any disposal site classified by the Regional Board must specify the types of wastes which are authorized for disposal at the site.^{18/} We interpret Requirement A.13, therefore, to permit the disposal of Halaco's wastes only at disposal sites, whose waste discharge requirements authorize the disposal of industrial wastes of the quality and quantity of Halaco's wastes.

B. Contention: Secondly, the Department contends that the Regional Board failed to protect surface water quality by allowing the filling of wetlands in accordance with Waste Discharge Requirement A.2 of Order No. 80-58. The Department further contends that the Regional Board acted contrary to state policy for water quality control, as expressed in Water Code Section 13142.5(a)(1) by adopting Requirement A.2 and Provision B.8.^{19/} of Order No. 80-58. The Department requests that requirements be revised to prohibit the disposal of wastes at the Halaco site on any area not already covered by wastes on October 27, 1980, the date of adoption of Order No. 80-58. The Department, in addition, requests that the Order be amended to require the eventual removal of waste material at the Halaco site so that (1) past beneficial uses of the receiving waters may be restored, and (2) future beneficial uses may be assured.

18. See Footnotes attached.

19. See Footnotes attached.

Finding: Waste Discharge Requirement A.2 of Order No. 80-58 limits waste disposal at the Halaco site to the existing 25-acre disposal area. The Department is seeking a prohibition against further expansion by Halaco into the 15-acre disposal area north of the northern berm. The Department contends that this area includes a year-round pond and other wetlands that comprise approximately seven acres of valuable, biologically sensitive fish and wildlife habitat. The Department further contends that Requirement A.2 of Order No. 80-58 would allow Halaco to fill in the pond and destroy the value of this area as a wetlands.

Water Code Section 13142.5 establishes state policy for the coastal marine environment. It provides, in pertinent part, as follows:

"In addition to any other policies established pursuant to this division, the policies of the state with respect to water quality as it relates to the coastal marine environment are that:

- (a) Waste water discharges shall be treated to protect present and future beneficial uses, and, where feasible, to restore past beneficial uses of the receiving waters. Highest priority shall be given to improving or eliminating discharges that adversely affect any of the following:

- (1) Wetlands, estuaries, and other biologically sensitive sites." (Emphasis added.)

The Regional Board, when it adopted Order No. 80-58, decided not to determine whether the Halaco site north of the

settling pond constitutes a wetlands for purposes of regulation under the NPDES permit program.^{20/} As indicated previously, the question of whether or not the Halaco site, or portions of the site, constitutes a wetlands subject to regulation under either Sections 402 or 404 of the Clean Water Act is still being litigated by Halaco and EPA in the federal district court. Given the controversy surrounding this issue, the Regional Board determined that it would be appropriate to revise requirements for Halaco, pursuant to the Board's broader authority under state law, pending resolution of the issue in federal court.

Since the adoption of Order No. 80-58, however, several circumstances have changed. First, Halaco has apparently spread solid waste residues over much of the 15-acre disposal area north of the northern berm of the settling pond.

Secondly, on July 21, 1981, the State Coastal Commission conditionally certified the Oxnard Local Coastal Plan. We have been informed by the Commission that the plan designates the 15-acre portion of the Halaco site north of the settling pond as wetlands.^{21/} We note that the State Coastal Act requires all state agencies to carry out their duties and responsibilities in conformity with the Act.^{22/} In particular, the Regional Board must comply with Water Code §13142.5 in conformity with the Coastal Act.

The Department, in addition, submitted photographs to this Board, at its workshop on September 2, 1981, depicting a pond,

20. See Footnotes attached.

21. See Footnotes attached.

22. See Footnotes attached.

which the Department contends has existed year-round at the Halaco site and which would be eliminated by the deposition of solid waste residues by Halaco. We note that this pond may, in fact, already have been eliminated.

We have also been informed by the Environmental Protection Agency that the National Enforcement Investigation Center conducted an inspection of the Halaco site in December 1980. The results of the inspection are contained in a report, which neither this Board nor the Regional Board has had the opportunity to review, but which may have a bearing on the adequacy of Order No. 80-58.

In light of the above circumstances, we have concluded that substantial issues have been raised regarding: (1) whether the 15-acre portion of Halaco's disposal site constitutes a wetlands or otherwise is a water of the State; (2) if so, whether Order No. 80-58 assures that the water quality of this area will be adequately protected for its beneficial uses, with respect to future waste discharges; and (3) if the area constitutes a wetlands or water of the State, whether enforcement action, such as the issuance of a cleanup and abatement order, would be appropriate in light of the past spreading of solid wastes over the area. We are unable to resolve these issues on the basis of the Regional Board record presently before us.

Our review of the record indicates that the Regional Board focused primarily on the discharge of liquid waste by Halaco to its settling pond and did not determine whether the area north of the settling pond constitutes a water of the State.

We have concluded that Order No. 80-58 is appropriate and proper insofar as it regulates the discharge of wastes by Halaco to its settling pond. Given that this discharge has occurred for a number of years and that Resolution No. 70-63 was in need of revision, this Board concludes that the Order should be approved.

However, in view of the issues which have been raised regarding the area north of the settling pond, we have also concluded that it is imperative that the Regional Board review Order No. 80-58 as soon as possible, but in no event later than the Regional Board's November Board meeting. This review should include a determination regarding whether Order No. 80-58 is appropriate to regulate future waste discharges on the 15-acre disposal area, and whether enforcement action would be appropriate with respect to past discharges. Although EPA, as discussed previously, has obtained a preliminary injunction prohibiting the further deposition of solid wastes in the 15-acre area, we have no indication how long the injunction will remain in effect.

In reaching this conclusion, we make the following observations. First, despite the fact that the Corps of Engineers declined to regulate the discharge of dredged material by Halaco to the 15-acre area, the Regional Board has clear authority under state law to regulate this activity to the extent that it may affect water quality.^{23/}

Secondly, although Order No. 80-58 does not determine whether the area north of the settling pond constitutes a wetlands

23. See Footnotes attached.

or a water of the State, its provisions require containment of the Halaco wastes so as to prevent migration of the wastes or waste leachate to waters of the State.^{24/} The Order also provides that "the disposal...shall [not] cause pollution..." and that "[w]astes discharged shall not affect waters of the State such that a pollution would result."^{25/} We presume that the discharge by Halaco of solid waste residues containing heavy metals into a year-round pond would unreasonably affect such waters for their beneficial uses, assuming that these included aquatic or wildlife habitat or other uses. We, therefore, interpret these provisions of Order No. 80-58 to prohibit the direct discharge of solid wastes by Halaco into such a pond. Order No. 80-58, nevertheless, must be revised to more clearly address the character of the area north of the settling pond and to clarify the waste disposal activities which are permissible in the area.

Finally, assuming that the Regional Board concludes that the area north of the settling pond constitutes a wetlands or otherwise is a water of the State, and that these waters have beneficial uses which warrant protection, the Regional Board can clearly regulate the discharge of dredged material to protect such beneficial uses. The addition of solid wastes to a wetlands or other waters of the State can alter the water quality of such waters. If the result of the addition of wastes to a wetland or other waters of the State is an actual loss of the wetlands or other waters, beneficial uses may obviously be impaired.^{26/}

24. See Footnotes attached.

25. See Footnotes attached.

26. See Footnotes attached.

Under these circumstances, a prohibition against discharge or enforcement action such as a cleanup and abatement order, to restore the area, may be appropriate and necessary.^{27/}

In summary, this Board concludes that Order No. 80-58 is appropriate and proper insofar as it regulates the discharge of wastes by Halaco to its settling pond. Significant issues, however, have been raised regarding the adequacy of the Order with respect to the discharge of wastes north of the settling pond. The Regional Board is, therefore, directed to expeditiously reconsider Order No. 80-58 in light of these issues. We further conclude that the record before us contains insufficient evidence upon which to grant the Department's request for a prohibition against further discharge of wastes in the 15-acre area or for a requirement mandating the eventual removal of all wastes at the site.

V. ADDITIONAL FINDINGS

We have reviewed Order No. 80-58 and conclude that several revisions are appropriate to clarify that the migration of wastes or waste leachate, as a result of runoff, from any portion of the 25-acre disposal area is prohibited. This Order therefore amends Waste Discharge Requirements A.5, A.7 and A.14 of Order No. 80-58 as follows:

"A.5. Positive hydraulic barriers with permeabilities of 1×10^{-6} cm/sec or less shall be provided beneath and around the settling pond, around

27. See Footnotes attached.

the berms or expanded berms, and around any other disposal areas. The berms themselves may fulfill this requirement for the lateral barriers of the permeability criteria. Likewise, evidence which proves that the soils beneath the pond satisfies the permeability criteria will fulfill the vertical barrier requirement. The barriers shall prevent:

- a. Wastes or waste leachate from contact with or percolation to ground waters;
- b. Lateral migration or escape of wastes or waste leachate to any watercourse, drainage channel, or the coastal waters; and
- c. Escape of waste or waste leachate to land under circumstances that the waters of the State may be affected."

* * *

"7. Surface runoff from areas tributary to this site and runoff from rain falling directly on the site and on the berms and on any other waste material shall be prevented from eroding the berms or carrying waste material, including runoff carrying wastes, from the site."

* * *

"14. Raw and processed materials, chemicals, or wastes associated with this operation shall not be stored on discharger's property in a manner such that rainwater could produce a leachate containing wastes which could be carried off the property."

We have also reviewed the monitoring program for Order No. 80-58 and note that it does not require any vertical monitoring of the groundwater directly below the settling pond. We, therefore, direct the Regional Board to consider whether this would be feasible and appropriate when the Board reconsiders its Order.

VI. CONCLUSIONS

After review of the record and consideration of the contentions of Halaco and the Department, and for the reasons discussed, we conclude as follows:

1. The Regional Board has jurisdiction to issue waste discharge requirements to Halaco Engineering Company to regulate the discharge of wastes from its metal recycling operation.

2. The issuance of Order No. 80-58 by the Regional Board was not arbitrary and capricious.

3. The Regional Board did consider economic factors in issuing Order No. 80-58.

4. It would be inappropriate to revise Order No. 80-58 in accordance with Halaco's proposal.

5. Order No. 80-58 need not contain a finding regarding whether the wastes discharged at the Halaco site are hazardous, as defined in the Health and Safety Code.

6. Order No. 80-58 is appropriate and proper insofar as it regulates the discharge of wastes by Halaco to its settling pond.

7. The Regional Board must reconsider Order No. 80-58, in light of the issues raised regarding the 15-acre area north of the settling pond, as expeditiously as possible but in no event later than the Regional Board's November Board meeting.

8. Order No. 80-58 should be revised to clarify that the migration of wastes or waste leachate, as a result of runoff, from any portion of the 25-acre site is prohibited.

9. The Regional Board should be directed to consider whether vertical monitoring of the groundwater directly below the settling ponds is feasible and appropriate.

VII. ORDER

IT IS HEREBY ORDERED that the petitions of Halaco and the Department are denied.

IT IS FURTHER ORDERED that the Regional Board is directed to reconsider Order No. 80-58, in light of the issues raised regarding the area north of the settling pond, as expeditiously as possible and in no event later than the Regional Board's November meeting.

IT IS FURTHER ORDERED that Order No. 80-58 is amended as provided in Section V of this Order.

IT IS FURTHER ORDERED that the Regional Board is directed to consider whether vertical monitoring below the settling pond would be feasible and appropriate.

DATED: September 17, 1981


Carla M. Bard, Chairwoman


L. L. Mitchell, Vice-Chairman


Bill B. Dunlap, Member

ABSENT
F. K. Aljibury, Member

Footnotes

1. See 23 CAC, Section 2054.
2. 23 CAC, Section 2052(a) provides, in part, that "the state board may, in its discretion, hold a hearing for the purpose of oral argument or receipt of additional evidence or both".
3. "Waste" is defined in Water Code Section 13050(d) as: "... sewage and any/all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature, including such waste placed within containers of whatever nature prior to, and for purposes of, disposal." (emphasis added.)
4. The following table provides a comparison of State Drinking Water Standards, monitoring data from samples of liquid waste from Halaco's settling pond, and toxic materials limitations from the State Board's "Water Quality Control Plan for Ocean Waters of California" [Ocean Plan], for copper, zinc, chromium, and lead:

State Drinking Water Standards*		Ocean Plan			Pond Samples**	
		6-Month Median	Daily Max.	Instantaneous Max.		
Copper	1.0***	.005	.02	.05	.19	.12
Zinc	5.0	.02	.08	.2	.04	<.01
Chromium	0.05	.002	.008	.02	.11	.14
Lead	0.05	.008	.032	.08	<.02	<.02

* 22 C.A.C. §§64435, 64473

** Analyses dated January 25, 1980 submitted to the Regional Board by the Department.

*** mg/l

5. In fact, Halaco's Exhibit N to its petition includes data indicating that some of the berm material has permeabilities greater than 1×10^{-6}
6. In particular, we have studied the permeability data included in Halaco's Exhibits M and N. Because all the permeability tests included in these Exhibits were conducted along and beyond the pond perimeter, lateral continuity or discontinuity of the materials beneath the pond remains unknown. Thus, we have concluded that the permeability tests which were performed do not demonstrate that impervious conditions exist beneath the pond.

7. Halaco has cited 48 Cal.Ops.Atty.Gen. 30 (July 21, 1966) in support of its argument that the Regional Board must show a significant possibility that discharges will unreasonably affect the waters of the State. This opinion construed the provisions of the Dickey Act, the predecessor to the Porter-Cologne Act. Under the Dickey Act, the Regional Boards were required to "prescribe requirements relative to any particular condition of pollution or nuisance, existing or threatened, in the region". Former Water Code Section 13053. (Emphasis added). "Pollution" was defined under the Act as "an impairment of the quality of the waters of the state by sewage or industrial waste to a degree which...adversely and unreasonably affect[s] such waters for domestic, industrial,...or other beneficial use..." Former Water Code Section 13005. Accordingly, in 48 Cal.Ops.Atty.Gen., supra, the Attorney General held that the jurisdiction of the Regional Board turned on whether a particular discharge created "a condition of pollution". Unlike the Dickey Act, the Porter-Cologne Act does not require that the Regional Boards show that a waste discharge will result in a condition of pollution before attempting to regulate it. As noted in the Legislative Committee Comment to Water Code Section 13263, prerequisites to the Boards' jurisdiction under the Porter-Cologne Act are: (1) a present or proposed discharge of waste, which (2) affects or may affect the quality of the waters of the State.
8. This section provides for the issuance of permits by the Corps for the discharge of dredged or fill material into waters of the United States. Waters of the United States include wetlands. 40 CFR §122.3.
9. Section 402 establishes the NPDES permit program, which regulates the discharge of pollutants from point sources to waters of the United States. Waters of the United States include wetlands. 40 CFR §122.3.
10. These provisions of Order No. 80-58 are as follows:
". . . ."
 5. Positive hydraulic barriers with permeabilities of 1×10^{-6} cm/sec or less shall be provided beneath and around the settling pond and around the berms or expanded berms. The berms themselves may fulfill this requirement for the lateral barriers of the permeability criteria. Likewise, evidence which proves that the soils beneath the pond satisfies the permeability criteria will fulfill the vertical barrier requirement. The barriers shall prevent:

- a. Wastes or waste leachate from contact with or percolation to groundwaters;
- b. Lateral migration or escape of wastes or waste leachate to any watercourse, drainage channel, or the coastal waters; and
- c. Escape of waste or waste leachate to land under circumstances that the waters of the State may be affected.

6. The barriers constructed to prevent lateral migration shall be equipped with collection drains and sumps to intercept all seepage for return to the discharge site or removal to a legal point of disposal.

7. Surface runoff from areas tributary to this site and runoff from rain falling directly on the site and on the berms shall be prevented from eroding the berms or carrying waste material from the site.

.....

9. If wastes discharged from this operation are used in the construction of the containment dikes or berms, leachate from rain falling on and percolating through the dikes or berms shall be prevented from flowing to areas outside the site.

.....

11. Wastes discharged shall not affect waters of the State such that a pollution would result."

11. Halaco contends that the Department is not an "aggrieved person" within the meaning of Water Code §13320 for purposes of State Board review of Order No. 80-58. Halaco also contends that the State Board should not review the Department's petition because the Department did not submit points and authorities in support of legal issues raised in its petition, as required by State Board regulations. We have concluded that these contentions are frivolous. The Department has clear statutory authority over the fish and wildlife resources of the State. In certain instances, the Department is even required to act through the Regional Board in correcting conditions of pollution. See, e.g., Cal. Fish & G.C. §§5650 and 5651. Further, we believe that dismissal of the Department's petition for failure to submit points and authorities would be unduly drastic in this instance.

12. Health Services, in Mike Kiado's letter dated December 18, 1979, referred to in Section IIIB above, identified the following substances in Halaco's solid waste as hazardous: copper compounds, zinc compounds, lead compounds, nickel chloride, chromic chloride or chromium trichloride, barium compounds and arsenic compounds.
13. Health and Safety Code §25117. This section provides:

"'Hazardous waste' means * * * a waste, or combination of wastes, which because of its quantity, concentration or physical, chemical, or infectious characteristics may either:

 - (a) Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.
 - (b) Pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed."
- See also 22 CAC §66680.
14. Monitoring data provided by Health Services indicates that the liquid in the Halaco pond is slightly alkaline.
15. Waste Discharge Requirement A.5.
16. Waste Discharge Require A.6.
17. Waste Discharge Requirements A.7, A.8, A.9., A.10.
18. See 23 CAC Subchapter 15, Chapter 3.
19. This provision requires Halaco to submit, not later than six months prior to discontinuing use of the disposal area, a detailed technical report describing site closure.
20. For purposes of regulation under Section 402 of the Clean Water Act, "wetlands" are defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 40 CFR §122.1.

21. The State Coastal Act defines a "wetland" as "lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens." Pub. Res. C. §30121.
22. Pub. Res. C. §30402. The effect, if any, of the litigation between Halaco and the Commission, discussed in Section III B above of this Order, on the Commission's action is uncertain.
23. See Water C. §§13260, 13263. Even if the Corps had issued a Section 404 permit to Halaco, the Regional Board would have concurrent authority under the Porter-Cologne Act to regulate the discharge. Section 404(t) of the Clean Water Act.
24. Waste Discharge Requirement A.5.
25. Waste Discharge Requirements A.11 and A.12.
26. See 27 Cal.Ops.Atty.Gen. 217 (1956) for a discussion of the Regional Boards' authority under the Dickey Act in analogous circumstances. In this opinion, the Attorney General concluded that the Regional Boards could regulate the discharge of fine-grained wastes into waters that drained into a storage reservoir. The discharge caused a progressive loss in reservoir capacity, resulting in an impairment in the beneficial use of the reservoir for storage.
27. See Water Code §§13243 and 13304.

